BEFORE THE ARIZONA CORPORATION COMMISSION



ORIGINAL

COMMISSIONERS

BOB STUMP–Chairman
GARY PIERCE
BRENDA BURNS
BOB BURNS
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IN THE MATTER OF THE APPLICATION OF JOHNSON UTILITIES, LLC DOING BUSINESS AS JOHNSON UTILITIES COMPANY, FOR APPROVAL OF SALE AND TRANSFER OF ASSETS AND CONDITIONAL CANCELLATION OF ITS CERTIFICATE OF CONVENIENCE AND NECESSITY.

**DOCKET NO. WS-02987A-13-0477**

**JOHNSON UTILITIES' RESPONSE IN OPPOSITION TO APPLICATION TO INTERVENE FILED BY KAREN CHRISTIAN, TODD HUBBARD, ALDEN WEIGHT AND STEVE PRATT**

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On April 11, 2014, Karen Christian, Todd J. Hubbard, Alden L. Weight and Steve Pratt[1] (collectively, the "Applicants") docketed an application to intervene (the "Application") in this case. Attached to the Application is a detailed two-page discussion of the issues the Applicants intend to raise if they are allowed to intervene. Johnson Utilities, L.L.C. ("Johnson Utilities" or the "Company") hereby opposes the Application on the grounds that the Applicants' participation in this case will unduly broaden the issues presented in violation of Arizona Administrative Code ("A.A.C.") R14-3-105(B). Further, the Company opposes the Application on the grounds that it does not state that it was served on the parties in this docket as required by A.A.C. R14-3-105(B) and R14-3-107(B) and (C). With specific regard to applicant Steve Pratt, Johnson Utilities objects to the Application because it was not signed by Mr. Pratt.

## I. GRANTING THE APPLICATION TO INTERVENE WILL UNDULY BROADEN THE ISSUES PRESENTED.

A.A.C. R14-3-105(B) states that "[n]o application for leave to intervene shall be granted where by so doing the issues theretofore presented will be unduly broadened, except upon leave of the Commission first had and received." In this docket, Johnson Utilities seeks authority from the Arizona Corporation Commission ("Commission") to

[1] Steve Pratt is listed in the Application by name but the Application does not include Mr. Pratt's signature.

sell and transfer its utility assets to the Town of Florence ("Town") and to conditionally cancel the Company's certificate of convenience and necessity ("CC&N") predicated upon the closing of the asset sale and transfer. The scope of the Commission's jurisdiction with regard to the transfer of assets from a private utility to a municipality is laid out in Arizona Attorney General Opinion No. 62-7, an opinion which has been accepted and followed by the Commission for more than 50 years. The Applicants reference Opinion 62-7 in their Application so they are clearly aware of its contents. Yet, the letter attached to the Application identifies a number of topics that the Applicants intend to raise in this docket which are clearly outside the scope of the Commission's jurisdiction as set forth in Opinion 62-7. Thus, granting of the Application would unduly broaden the issues presented in this docket.

The Applicants identify three categories of topics in their Application. First, they assert that current customers of Johnson Utilities have had no voice in the sale and transfer of the Company's assets to the Town. Second, they raise issues regarding current rates and future rates. Third, they ask the Commission to order that additional provisions be included in a management agreement ("Management Agreement") between Johnson Utilities and the Town that will become effective after the asset sale and transfer closes. Each of these topics will be discussed below, beginning with the Management Agreement.

**A. <u>Changing the Management Agreement</u>.**

Pursuant to Section 2.06 of the Asset Purchase and Lease Agreement that will be executed by Johnson Utilities and the Town (a copy of which is attached to the Direct Testimony of Charles A. Montoya dated April 9, 2014), the parties will enter into a Management Agreement whereby Johnson Utilities will operate the utility business for the Town for a period of five years following the closing. Town Manager Charles Montoya explains in his Direct Testimony that the Management Agreement will help ensure that the transaction and transfer of assets occur seamlessly "without causing any

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problems to the customers."[2]

Although the Applicants intend to ask the Commission to order various revisions and additions to the Management Agreement as set forth in their Application, the Commission lacks jurisdiction to order the requested revisions and additions. Opinion 62-7 states, in part, as follows:

> The Corporation Commission has no jurisdiction to regulate the relationships between a municipality and its consumers, even though such consumers lie beyond the boundaries of the city. The relations between the municipality and its consumers can only be regulated through the Legislature.
>
> * * *
>
> We consider it now settled law that the Arizona Corporation Commission has no jurisdiction over the municipalities in either the regulation, purchase, acquisition or operation of their public utility activities within or without municipal boundaries.[3] (emphasis added)

The Management Agreement is directly related to the "operation of [the Town's] public utility activities within or without municipal boundaries," and thus, the Commission lacks the authority to order revisions or additions to that agreement. Additionally, Opinion 62-7 states that:

> The Corporation Commission may only concern itself with questions relating to whether or not the proposed transfer will be injurious to the rights of the public. The Commission has nothing to do with the rights of the intended purchaser and has no power to determine the validity of the contract, fairness of the purchase price, or feasibility of the project.
>
> * * *
>
> In the situation when the entire assets of the private utility are acquired by a municipality and all the customers are to be served by it, the utilities' public service function is ended. The Corporation Commission cannot prohibit the sale of its assets. The hearing and order must be directed only to a determination that there are no other customers or persons who have been served by the private utility and that it will, in fact, have been relieved of all its duties to serve such customers. The Commission's determination is to

[2] Direct Testimony of Charles A. Montoya (April 9, 2014) at 6-7.
[3] Arizona Attorney General Opinion No. 62-7 at 4-5.



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be made relating only to these matters. They may not enter an order denying the public utility the right to dispose of its assets, except upon the grounds that the utility is not in fact terminating its function in the service of its customers. This is the effect of A.R.S. §40-285(C).[4] (emphasis added)

With specific regard to rate setting, the Arizona courts have also made clear that the Commission does not have jurisdiction over the rates charged by municipal providers of utility service, even where those municipal providers serve customers outside of their municipal boundaries. In *Jung v. City of Phoenix*, 160 Ariz. 38, 770 P.2d 342 (Ariz. 1989), the Arizona Supreme Court considered an appeal in a case where the City of Phoenix imposed increased water rates for residents located outside of the City's municipal boundaries and ruled as follows:

> At the outset we point out that A.R.S. § 9-516(C) speaks in terms of the city rendering utility service without its boundaries. The furnishing of utility service by a public service corporation is regulated by the Corporation Commission, and such utility service must be provided at reasonable rates. Although the Corporation Commission has no jurisdiction over municipal charges for utility service, we believe that the implication of reasonable rates for utility service must be read into A.R.S. § 9-516(C). If such a construction is not adopted, a city could charge any rate it wished despite its effect on the nonresidents' need for utility service. The legislature did not intend to place nonresidents of a city in such an impossible situation. The obligation of a city to continue utility service as required by A.R.S. § 9-516(C) necessarily implies that the charges for such services will be at reasonable rates.[5]

Additionally, A.R.S. §9-511.01 provides a specific statutory rate-setting procedure that must be followed by all municipalities, including the Town of Florence, in setting "just and reasonable" rates for utility service. The statute states:

> A. A municipality engaging in a domestic water or wastewater business shall not increase any water or wastewater rate or rate component, fee or service charge without complying with the following:
>
> 1. Prepare a written report or supply data supporting the increased rate or rate component, fee or service charge. A copy of the report shall be made available to the public by

[4] *Id.* at 13-14.
[5] *Jung v. City of Phoenix*, 160 Ariz. 38, 770 P.2d 342, 344-345 (Ariz. 1989).



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filing a copy in the office of the clerk of the municipality governing board at least thirty days before the public hearing described in paragraph 2.

2. Adopt a notice of intention by motion at a regular council meeting to increase water or wastewater rates or rate components, fees or service charges and set a date for a public hearing on the proposed increase that shall be held not less than thirty days after adoption of the notice of intention. A copy of the notice of intention showing the date, time and place of the hearing shall be published one time in a newspaper of general circulation within the boundaries of the municipality not less than twenty days before the public hearing date.

B. After holding the public hearing, the governing body may adopt, by ordinance or resolution, the proposed rate or rate component, fee or service charge increase or any lesser increase.

C. Notwithstanding section 19-142, subsection B, the increased rate or rate component, fee or service charge shall become effective thirty days after adoption of the ordinance or resolution.

D. Any proposed water or wastewater rate or rate component, fee or service charge adjustment or increase shall be just and reasonable.

E. Rates and charges demanded or received by municipalities for water and wastewater service shall be just and reasonable. Every unjust or unreasonable rate or charge demanded or received by a municipality is prohibited and unlawful. (emphasis added)

Finally, with specific regard to water service, there is an additional statute which applies to rate-setting for customers located outside the municipal boundaries of a town, city or county. A.R.S. § 9-511(A) states:

A. A municipal corporation may engage in any business or enterprise which may be engaged in by persons by virtue of a franchise from the municipal corporation, and may construct, purchase, acquire, own and maintain within or without its corporate limits any such business or enterprise. A municipal corporation may also purchase, acquire and own real property for sites and rights-of-way for public utility and public park purposes, and for the location thereon of waterworks, electric and gas plants, municipal quarantine stations, garbage reduction plants, electric lines for the transmission of

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electricity, pipelines for the transportation of oil, gas, water and sewage, and for plants for the manufacture of any material for public improvement purposes or public buildings. If a municipality provides water to another municipality, the rates it charges for the water to the public in the other municipality shall be one of the following:

1. The same or less than the rates it charges its own residents for water.

2. The same or less than the rates the other municipality charges its residents for water.

3. If the other municipality does not provide water, the average rates charged for water to the residents in the other municipality by private water companies.

4. Rates determined by a contract which is approved by both municipalities and in which such rates are justified by a cost of service study or by any other method agreed to by both municipalities. (emphasis added)

In the attachment to their Application, the Applicants state that they will ask the Commission to modify important terms and impose material additional conditions in the Management Agreement, including the following:

- Ordering the creation of a customer advisory board with members elected in homeowners association elections or municipal elections, which members could never be dismissed by the Town of Florence.

- Ordering (i) that utility rates be reduced to the levels which existed prior to the time the Commission approved the inclusion of income tax expense in rates for Johnson Utilities; (ii) freezing rates at such levels for 18 months following the close of the sale; (iii) establishing a "full legal protocol" for future rate increases by the Town; and (iv) subjecting future rate increases to a vote of the current Johnson Utilities customers.

- Prohibiting the Town from passing the cost of infrastructure repairs on to customers, or from passing on fines incurred during the period the Management Agreement is in effect.

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- Limiting the term of the Management Agreement to three years, and authorize Johnson Utilities to continue on as a "special consultant" for up to ten years beyond the transition period.

- Adding provisions for terminating or replacing Johnson Utilities as manager.

As discussed in more detail below, each of these topics which the Applicants intend to raise at the hearing are clearly outside the Commission's jurisdiction as described in Arizona Attorney General Opinion No. 62-7 and Arizona case law, and therefore, will unduly broaden the issues presented in this proceeding if the Application is granted. Thus, the Application should be denied.

With regard to the creation of a customer advisory board, the Commission lacks the authority to impose such a requirement as a condition of approving the sale and transfer of assets to the Town of Florence. Moreover, even if the Commission were to require a customer advisory board in its order, the Commission would have no ability to enforce compliance with the requirement by the Town. The Commission should not permit the Applicants to intervene in order to seek conditions which the Commission has no authority to order or enforce.

Likewise, the requests of Applicants that the Commission reduce existing authorized rates, then freeze those rates for 18 months, and then subject future rate increases "if sufficiently large" to a vote of the current Johnson Utilities customers is far outside the Commission's authority and a direct violation of A.R.S. §9-511.01. There is no legal basis for the Commission to order a reduction of authorized rates as a condition of approving a sale and transfer of assets to the Town. Similarly, while Town Manager Montoya has stated in Direct Testimony that "the Town does not intend to make any changes to the rates charged to Johnson's current customers, as well as those customers acquired after the acquisition, for at least 18 months,"[6] the Commission is without the authority to enforce a rate freeze against the Town. Finally, the Applicants' stated intent to seek a condition that would require the Town to obtain the consent of current Johnson

[6] Direct Testimony of Charles A. Montoya (April 9, 2014) at 7, lines 13-17.



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Utilities customers to implement a rate increase that is "sufficiently large" runs afoul of the municipal rate-setting requirements of A.R.S. §9-511.01 and must be rejected.

Applicants' effort to seek a modification of the Management Agreement to include "the full legal protocol for future rate increases" will also unduly broaden the issues presented in this case. In actuality, the "full legal protocol" for future rate changes is already spelled out in A.R.S. Title 9, in the legal cases which interpret Title 9, and in the Town's ordinances. Thus, there does not need to be any additional discussion on this topic. To the extent the Applicants want the Commission to order conditions which are contradictory to Title 9, the applicable case law or the Town's ordinances, then the Commission lacks the authority to order such conditions. Either way, there is no legal basis or reason for the Commission to address the legal protocol for future rate changes by the Town and it would be a waste of resources by the parties and the Commission to spend time on that topic.

The Applicants also intend to seek a condition that would prohibit the Town from passing on the cost of infrastructure repairs to customers. For all of the reasons discussed above, there is no legal basis or authority for the Commission to impose or enforce such a condition on the Town. With regard to any hypothetical fines related to the actions of Johnson Utilities as manager under the Management Agreement following the closing, it will be incumbent upon the Town to address such issues if they arise. Johnson Utilities notes that under Section 2.02(f) of the Asset Purchase and Lease Agreement, the Company will remain responsible for any liabilities associated with any violations of ADEQ rules or regulations that occurred prior to the closing.

The Applicants' remaining requests that the Commission reduce the term of the Management Agreement to three years and add provisions for terminating or replacing Johnson Utilities as manager is, once again, outside of the Commission's jurisdiction. As stated in Arizona Attorney General Opinion No. 62-7, "it [is] now settled law that the Arizona Corporation Commission has no jurisdiction over the municipalities in either the regulation, purchase, acquisition or operation of their public utility activities within or



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without municipal boundaries."[7] The Applicants' efforts to modify or change provisions of the Management Agreement will unduly broaden the issues presented in this docket in violation of A.A.C. R14-3-105(B).

In summary, the Applicants' request to intervene in order to attempt to modify important terms and impose material additional conditions in the Management Agreement will unduly broaden the issues in this docket and the Commission should deny Applicants' Application. However, in the event the Commission grants intervenor status to the Applicants, Johnson Utilities requests that the Commission limit the matters that may be raised to matters the Commission may legally consider, order and enforce in an asset transfer docket, consistent with Opinion 62-7.

In addition, Johnson Utilities notes that pursuant to A.A.C. R14-3-104(C), the Commission may declare a class of parties where two or more parties have substantially like interests and positions, and where participation by other members of the same class may be deemed cumulative. Given that the Applicants joined in the same Application, Johnson Utilities submits that they have substantially like interests and positions in this case. Thus, in the event the Commission grants intervention, Johnson Utilities requests that the Commission order the Applicants to identify one person who will represent the class at the hearing.

**B. <u>Changing Existing and Future Rates for Water and Sewer Service</u>.**

In the attachment to their Application, the Applicants identify several matters which they intend to raise regarding current and future rates for water service. First, the Applicants note that while Company witness Daniel Hodges testified in his pre-filed Direct Testimony that the Town of Florence "has agreed to maintain current customer rates for 18 months after the sale if effective," they see no formal provision for this commitment in the current "terms of sale," which Johnson Utilities construes as a reference to the Asset Purchase and Lease Agreement. As discussed above, Town Manager Montoya has stated in his Direct Testimony dated April 9, 2014, that "the

[7] Arizona Attorney General Opinion No. 62-7 at 4-5.



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Town does not intend to make any changes to the rates charged to Johnson's current customers, as well as those customers acquired after the acquisition, for at least 18 months."[8] However, neither the Town nor Johnson Utilities intend to incorporate this statement of the Town's current intent in the Asset Purchase and Lease Agreement.

As explained above, the Town is legally obligated to follow A.R.S. §9-511.01 in setting rates for residents and non-residents. Thus, even if the Town desired to change rates the day after closing, it would first need to conduct a rate study or obtain data to justify the rate change (as it has done in the past), then adopt a resolution regarding the Town's intention to change rates, then notice a public hearing, then conduct a public hearing, and then adopt the new rates in a council meeting open to the public. Once adopted, the new rates would become effective thirty days later. Considering the time that it would take to satisfy all of the prerequisites to a rate change, it is certainly unlikely that the Town could approve a rate change short of 18 months following the date of closing. However, the parties should bear in mind that the Commission has no authority over the Town in the setting of rates for utility service, nor can the Commission require the parties to modify the Asset Purchase and Lease Agreement to include such a limitation. What the Town Manager has said on the record with respect to maintaining the existing Johnson Utilities rates speaks for itself and the Applicants are entitled to nothing more. Thus, the Applicants' efforts to try to seek an amendment to the Asset Purchase and Lease Agreement to secure a binding commitment from the Town that it will maintain current rates will unduly broaden the issues presented in this proceeding in violation of A.A.C. R14-3-105(B). The Applicants and all other current customers of Johnson Utilities have all of the protections afforded by A.R.S. Title 9.

Second, the Applicants intend to assert that the current rates should be reduced to remove the income tax expense previously approved by the Commission in Decision 73992. There is no legal basis or authority to eliminate expenses that have previously been found by the Commission to be just and reasonable as a condition of approving the

[8] Direct Testimony of Charles A. Montoya (April 9, 2014) at 7, lines 13-17.



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sale and transfer of assets to a municipality. Thus, any effort to decrease the current rates of Johnson Utilities will unduly broaden the issues presented in this proceeding in violation of A.A.C. R14-3-105(B) and the Application should be denied.

Third, the Applicants take issue with the fact that there is no provision in the Asset Purchase and Lease Agreement "for how rates will be assessed or governed in the future." More specifically, the Applicants state that they "would be satisfied with a concrete proposal as to how rates will be established consistent with the 'just and reasonable' standard, as well as how they will be governed...." There has already been significant discussion above regarding the statutory requirements that apply to municipal rate setting as contained in A.R.S. Title 9 so that discussion will not be repeated here. Suffice it to say that the rate setting requirements applicable to the Town of Florence are well established, well known and well articulated in applicable statutes, case law, and the ordinances of the Town. The Commission does not have the jurisdiction to regulate the Town in its setting of rates, nor can the Commission impose any condition which contradicts the requirements of the applicable statutes, caselaw and ordinances. Thus, any effort by the Applicants to establish a rate-setting procedure which deviates in any way from the statutory rate-setting procedure described herein would unduly broaden the issues presented in this proceeding.

For all of the reasons discussed above, the Application should be denied. In the event the Commission grants intervenor status to the Applicants, Johnson Utilities requests that the Commission limit the matters that may be raised to matters that are properly within the Commission's jurisdiction to consider, order and enforce in an asset transfer docket, consistent with Decision 62-7.

**C. <u>Opportunities for Customer Input</u>.**

Applicants assert that the customers of Johnson Utilities "have had no voice in this process." However, there are several ways for customers to provide input regarding the transaction which is the subject of this docket, including:

- Submit written comments in the docket.



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- Make public comment at the May 19, 2014, hearing.
- File a motion to intervene to participate as a party.

Johnson Utilities has previously provided two notices via mail directly to its customers regarding the asset transfer docket. The most recent customer notice was in a form prescribed by the Commission in this docket and was mailed on or before March 26, 2014. In addition, the Company published the prescribed notice in the statewide edition of *The Arizona Republic* on March 24, 2014. The Town of Florence has held additional publicly noticed meetings regarding the asset transfer. Customers of Johnson Utilities have had ample notice of this docket, and customers interested in making their voices heard have various options at their disposal. Thus, Johnson Utilities refutes the assertion of Applicants that customers have had no voice in this process.

Additionally, it is important to recognize the very limited nature of the Commission's jurisdiction in an asset transfer docket such as this. As discussed herein, the matters raised by the Applicants are not properly before the Commission because the Commission lacks the authority to grant the relief requested by the Applicants. Likewise, any matter raised by any customer of Johnson Utilities is subject to the same limitations on the Commission's jurisdiction.

## II. THE APPLICATION TO INTERVENE IS DEFECTIVE BECAUSE IT WAS NOT SERVED ON THE OTHER PARTIES IN THIS DOCKET AS REQUIRED BY A.A.C. R14-3-105(B) AND r14-3-107(B) AND (C).

A.A.C. R14-3-105(B) requires that an application to intervene be served on the parties to the docket. For documents that require service, A.A.C. R14-3-107(B) specifies that service shall be by first class United States mail, and A.A.C. R14-3-107(C) requires that a proof of service appear on the document. The Application does not include a proof of service evidencing that it was mailed to the parties in this docket and Johnson Utilities has not received a copy of the Application from the Applicants as of the date of this filing. Thus, the Application is defective and should be denied because Applicants have not complied with the applicable rules.

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## III. THE APPLICATION TO INTERVENE IS DEFECTIVE WITH RESPECT TO APPLICANT PRATT BECAUSE IT WAS NOT SIGNED BY MR. PRATT.

The Application lists Steve Pratt as one of the Applicants and has a signature line for his signature. Yet, Mr. Pratt has not signed the Application and no other Applicant has signed on his behalf. Thus, there is no evidence of Mr. Pratt's intent to intervene in this docket. For this reason, the Application is defective and should be denied because it does not include his signature.

## IV. CONCLUSION.

There are clear and concrete limits on the matters the Commission may properly consider in a proceeding for approval to transfer the assets of a public utility to a city, town or county. In fact, Arizona Attorney General Opinion No.62-7 states that the Commission "may not enter an order denying the public utility the right to dispose of its assets, except upon the grounds that the utility is not in fact terminating its function in the service of its customers."[9] Thus, in light of the Commission's very limited jurisdiction in this case, the Application would unduly broaden the issues presented if granted, in violation of A.A.C. R14-3-105(B). For the reasons discussed herein, the many matters raised by the Applicants are not properly before the Commission because the Commission lacks the authority to grant the relief requested by the Applicants. Under these circumstances, the Application should be denied.

However, if the Commission grants the Application, Johnson Utilities requests that the Commission expressly limit the matters that can be raised by the Applicants to matters that are properly before the Commission in an asset transfer docket, consistent with the limitations set forth in Opinion 62-7. To allow otherwise would certainly result in a substantial waste of the resources of the Commission and the parties in this docket, and could result in a delay in the transfer of the assets to the Town.

[9] Arizona Attorney General Opinion No. 62-7 at



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Finally, if the Commission grants the Application, Johnson Utilities requests that the Commission declare the Applicants a single class of parties pursuant to A.A.C. R14-3-104(C) and order the Applicants to identify one person who will represent the class at the hearing.

RESPECTFULLY submitted this 15th day of April, 2014.

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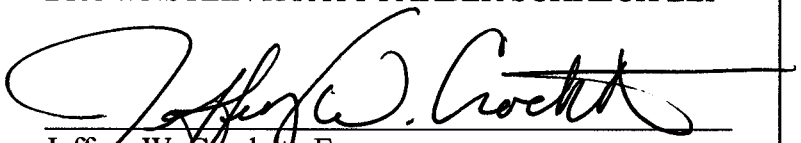

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ORIGINAL and thirteen (13) copies of the foregoing filed this 15th day of April, 2014, with:

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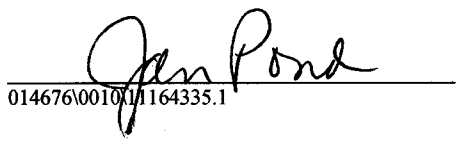

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